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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/724,839	12/01/2003	Gregory Dean Sunvold	P147	2171
27752 7590 02/18/2010 THE PROCTER & GAMBLE COMPANY Global Legal Department - IP Sycamore Building - 4th Floor 299 East Sixth Street CINCINNATI, OH 45202				
EXAMINER OLSON, ERIC				
ART UNIT		PAPER NUMBER		
1623				
MAIL DATE		DELIVERY MODE		
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/724,839

Applicant(s)

SUNVOLD ET AL.

Examiner

ERIC S. OLSON

Art Unit

1623

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 32, 34, 42, 47 and 55 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 32, 34, 42, 47 and 55 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-06)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Detailed Action

This office action is a response to applicant's communication submitted December 8, 2009 wherein claims 32, 34, and 47 are amended and claims 33, 40, and 43 are cancelled. This application was filed December 1, 2003, and makes no priority claims.

Claims 32, 34, 42, 47, and 55 are pending in this application.

Claims 32, 34, 42, 47, and 55 as amended are examined on the merits herein.

Applicant's amendment, submitted December 8, 2009, with respect to the rejection of instant claims 32-34, 40, 42, 47, 53, and 55 under 35 USC 112, second paragraph, for reciting the indefinite term, "companion animal," has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to clearly define what animals ab being treated. Therefore the rejection is withdrawn.

Applicant's amendment, submitted December 8, 2009, with respect to the rejection of instant claims 32-34, 40, 42, 47, 53, and 55 under 35 USC 103(a) for being obvious over Heisey et al., has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to require that the food composition be a kibble. Therefore the rejection is withdrawn.

The following new grounds of rejection are necessitated by Applicant's amendment:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 32, 34, 42, 47, and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heisey et al. (US pre-grant publication 2002/0132780, of record in previous action) in view of Bui et al. (US pre-grant publication 2003/0138547, cited in PTO-892)

Heisey et al. discloses a method for treating bone or joint dysfunction in a subject comprising administering a composition comprising a chondroprotective agent, a

sweetening agent, and at least 10% water. (p. 1 paragraphs 0008-0012) A preferred sweetening agent is a fructooligosaccharide mixture comprising a 40:50:10 ratio of nystose to kestose to fructosyl-nystose. (p. 6 paragraph 0091) Sweetening agents are preferably used in an amount of 0.00001-75% of the composition. (p. 6 paragraph 0097) Furthermore the composition can include soluble fiber. (p. 8 paragraph 0129) Preferred soluble fibers are fructooligosaccharides including a 40:50:10 ratio of nystose to kestose to fructosyl-nystose. (p. 9 paragraph 0132) The amount of soluble fiber is in the range of about 0.01-15%. (p. 9 paragraph 0134) The compositions are suitable for use in nonhuman animals including cats and dogs, which are reasonably considered to be companion animals. (p. 2 paragraph 0036) The compositions of Heisey et al. are identified as having low carbohydrate content and low caloric value. (p. 1 paragraph 0008) Heisey et al. does not specifically disclose a method where the composition has the specific claimed ratio of 30-40:50-60:5-15 kestose:nystose:fructosyl-nystose, or wherein the total amount of fructooligosaccharide is between 0.01 and 2%. Heisey et al. also does not specifically disclose a method wherein the composition is a kibble.

Bui et al. discloses a pet food for weight management of a companion animal comprising about 35-70% of a protein, about 4-10% of a fat, about 5-25% of a fiber, about 10-35% of a digestible carbohydrate, and about 0.1-1% of a functional ingredient. (p. 2 paragraph 0015) This composition is useful as a high protein diet for weight loss in domestic animals. (p. 2 paragraph 0028) Kibble is exemplified as one potential embodiment of this food composition. (p. 3 paragraph 0030)

It would have been obvious to one of ordinary skill in the art at the time of the invention to practice the methods described by Heisey et al. using a composition containing between 0.01 and 2% of a fructooligosaccharide, and furthermore using the claimed ratio of kestose to nystose to fructofuranosyl-nystose. One of ordinary skill in the art would have reasonably been motivated to adjust the amounts of various fructooligosaccharide components in the composition in order to optimize the biological effects of said composition. One of ordinary skill in the art would reasonably have expected success because the claimed amount of fructooligosaccharide falls within the broad range already disclosed by the reference for sweetening agents and soluble fiber, and because the specifically claimed ration of the three components is very close to the preferred ratio disclosed by Heisey et al.

It would also have been obvious to one of ordinary skill in the art at the time of the invention to prepare the food compositions of Heisey et al. as a kibble. One of ordinary skill in the art would have been motivated to do so, and would reasonably have expected success because Bui et al. discloses preparing a low calorie and low carbohydrate animal food as a kibble.

Therefore the invention taken as a whole is *prima facie* obvious.

Response to Argument: Applicant's arguments, submitted December 8, 2009, with respect to the rejection under 35 USC 103(a) in the previous action over Heisey et al. alone, have been fully considered and not found to be persuasive to remove the rejection. Applicant argues that the compositions described by Heisey et al. are not nutritionally balanced. However, according to p. 5 lines 27-30 of the instant

specification, a nutritionally balanced food is one that has known required nutrients to sustain life in proper amounts and proportion based on recommendations of recognized authorities in the field of companion animal nutrition. The low carbohydrate compositions disclosed by Heisey et al. are disclosed to be suitable for mammals which are diabetic or at risk for diabetes, as well as those in need of a reduced sugar intake. Therefore, from the perspective of these individuals, this composition is in fact a nutritionally balanced composition as it has the proper nutrients necessary to sustain life. Furthermore, there is no absolute requirement for a nutritional composition to contain large amounts of carbohydrate in order to sustain life, provided that the subject receives adequate calories from protein and fat in place of the missing carbohydrate. A composition containing the small amount of carbohydrates present in the prior art composition is still sufficient to sustain life, and therefore is a nutritionally balanced composition according to the definition provided in Applicant's specification.

Applicant further argues that Heisey et al. does not disclose a kibble. This argument is moot in view of the new rejection above, which includes the reference Bui et al., which discloses low carbohydrate low calorie animal food prepared as kibbles.

Therefore the rejection is deemed proper and made **FINAL**.

The following rejections of record in the previous office action are maintained:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 32, 34, 42, 47, and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anantharaman et al. (US patent 5952033, of record in previous cation) in view of Kaplan et al. (of record in previous action)

Anantharaman et al. discloses a gelatinized cereal product containing inulin that is palatable to dogs and cats, preferably comprising about 0.04% kestose, 0.04% nystose, and 0.04% fructosyl-nystose, for a total fructooligosaccharide content of about 0.12%. (column 2 lines 20-59) This composition can be administered to a pet (companion animal) to decrease fecal volume. (column 3 lines 12-17) Several examples (columns 6-9) are given in which compositions according to the invention are administered to dogs or cats, with examples 1 and 2 disclosing increased levels of bifidobacteria. Claim 23 of Anantharman et al. also claims a method for increasing the

population density of lactic acid bacteria in a pet (i.e. a companion animal) comprising administering the claimed composition. Anantharaman et al. does not disclose a method comprising administering a composition having the specific claimed ratio of kestose to nystose to furtofuranosyl-nystose.

Kaplan et al. discloses a study of the bacterial fermentation properties of a commercial fructooligosaccharide mixture comprising 32% GF₂ (kestose), 53.6% GF₃ (nystose), and 9.8% GF₄. (fructofuranosyl-nystose). (p. 2682, right column paragraphs 2-3) The fructooligosaccharide mixture was found to support the growth of various beneficial *Lactobacillus* and *Bifidobacterium* species. (p. 2683, left column table 1)

It would have been obvious to one of ordinary skill in the art at the time of the invention to use the commercial fructooligosaccharide mixture studied by Kaplan et al. in the compositions and methods described by Anantharaman et al. in an amount of 0.01%-2%. One of ordinary skill in the art would have been motivated to use this composition because it is disclosed by Kaplan et al. to be useful for the desired effect, namely promoting the growth of beneficial lactic acid bacteria such as *Lactobaccilli* and *Bifidobacteria*. One of ordinary skill in the art would reasonably have expected success because substituting one known prior art composition with another that is known to have the same effect is well within the ordinary and routine level of skill in the art.

Therefore the invention taken as a whole is *prima facie* obvious.

Response to Argument: Applicant's arguments, submitted December 8, 2009, with respect to the above ground of rejection, have been fully considered and not found to be persuasive to remove the rejection. Applicant argues that the prior art references

teach away from their combination as they are directed toward different benefits using different compositions. However, as described in the body of the rejection, the composition of Anantharaman works by increasing the population density of lactobacteria such as bifidobacteria. Therefore one of ordinary skill in the art would have expected that increasing populations of lactobacteria and bifidobacteria would improve the effectiveness of the compositions of Anantharaman et al. for the desired purpose. (Reducing fecal volume)

Applicant further argues that the claimed invention is directed toward producing a different effect than the compositions and methods described in the prior art. Specifically, Applicant argues that they do not disclose a method of enhancing calcium absorption, improving bone health, improving strength, or improving physical activity performance. However, these specific effects would all be expected to be present in any dog or cat administered the composition. Regardless of the various effects recited in the claims, the actual scope of the claimed methods involve administering the disclosed composition to any dog or cat. Therefore the combined method of Anantharaman et al. in view of Kaplan et al. would be reasonably expected to accomplish the same secondary effects recited in the claims.

For these reasons the rejection is deemed proper and made **FINAL**.

Conclusion

No claims are allowed in this application. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS**

ACTION IS MADE FINAL. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ERIC S. OLSON whose telephone number is (571)272-9051. The examiner can normally be reached on Monday-Friday, 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia Anna Jiang can be reached on (571)272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Eric S Olson/
Examiner, Art Unit 1623
2/9/2010